

55160 Fogarty

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-221304 **DATE:** March 10, 1986
MATTER OF: Experimental Pathology Laboratories,
Inc.

DIGEST:

1. While the contracting agency has the responsibility to evaluate proposals in accordance with stated evaluation criteria and to make essentially subjective determinations concerning the adequacy and relative desirability of proposals, GAO independently scrutinizes the contractor selection process to determine if the agency's selection decision was reasonable under the circumstances and in conformance with the evaluation criteria and applicable statutes or regulations.
2. Where the evaluation criteria in a solicitation give greater weight to technical merit than cost, the selection of a lower cost offeror whose technical proposal has also been reasonably evaluated as technically superior is required.
3. Where a protester is aware of the basis for a protest issue at the time of initial protest filing but does not raise the issue until it submits its comments on the agency report, the protest issue is untimely raised and will not be considered by GAO.

Experimental Pathology Laboratories, Inc. (EPL), protests the award of a cost-plus-fixed-fee, level-of-effort contract to Pathology Associates, Inc. (PAI), under request for proposals (RFP) No. CI85-0088, issued by the Environmental Protection Agency (EPA). The RFP was a total small business set-aside for providing pathology services in support of an EPA environmental health research program for a period of 12 months with options for 2 additional years. Although EPA has not released any detailed information to the protester concerning the evaluation of proposals, because it believes this information to be privileged, EPL

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nevertheless asserts that EPA failed to follow its announced criteria in evaluating proposals. This contention is based on EPL's claim to be a highly experienced laboratory with 15 years of experience in providing pathology services while the awardee is allegedly a "newcomer" which could not have submitted a substantially superior technical proposal to justify its selection as the successful offeror. EPL also maintains that EPA "may" have misevaluated two elements of cost which flawed EPA's determination of the most advantageous proposal from a cost standpoint.

We deny the protest in part and dismiss it in part.

The evaluation of proposals was conducted under the provisions of EPA Source Selection Procedures contained in 48 C.F.R. subpart 1515.6 (1984). Specifically, the responsibilities for the evaluation and selection process are divided among a Technical Evaluation Panel (TEP), which evaluates and scores proposals, develops summary facts and findings, and recommends selection of a source; a Business Evaluation Panel, which evaluates the business and contractual aspects of proposals; and the Source Selection Official (SSO), here the contracting officer, who selects an offeror for contract award. Award to PAI followed the formal source selection process which resulted in the decision that selection of PAI's proposal, rather than that submitted by EPL, would be more advantageous to the government. While our Office has been furnished the evaluation reports and other relevant exhibits concerning this protest, the agency, as stated previously, considers these documents to be privileged and has not provided them to the protester. Although we therefore are unable to reveal technical and cost details concerning the evaluation, our decision is based on a review of all relevant reports and exhibits submitted to our Office by EPA.

For award purposes, the solicitation generally stated that technical quality was more important than cost in determining the most advantageous proposal. In descending order of importance, and as secondary factors, the solicitation listed small business and labor surplus area concern status and record of past performance as general evaluation factors for award. The solicitation also specifically listed the following five evaluation criteria and their respective weights:

- "1. Offeror's demonstrated understanding of all aspects of the scope of work and degree that proposal meets project needs. (35 points).

"2. Offeror's demonstrated scientific knowledge and experience in similar projects involving the indicated range of pathology technical services. (20 points).

"3. Offeror's demonstrated experience of proposed personnel. (20 points).

"4. Offeror's demonstrated knowledge and experience in the exercise of GLP [good laboratory practices] and QA [quality assurance] principles and methods, and ability to meet QA documentation and reporting needs. Proposals shall also be evaluated as to how well they address the QA requirements set forth in Section C. (15 points).

"5. Offeror's demonstrated adequacy of facilities and management resources that are proposed to be brought to bear in performing this effort. (10 points).

"MAXIMUM SCORE: 100 points."

Concerning cost, the solicitation cautioned offerors that as proposals become more equal in technical merit, the evaluated cost becomes more important.

The solicitation also included precise minimum qualifications and level-of-effort estimates for certain labor categories--such as project leader (professional level 4); project engineer (professional level 3); senior technician (technical level 3); a technician (technical level 2). The offeror's proposed labor rate times the estimated man-hours for each category, plus the offeror's proposed fee, as well as certain other direct costs and travel expenses, basically provided the basis for cost evaluation.

Four firms submitted proposals. EPA evaluated the initial technical and cost proposals, and both EPL and PAI were determined to be in the competitive range.

The best and final offers of the two firms were evaluated with regard to technical factors and cost reasonableness. The results of the best and final offers from a cost standpoint were as follows (only the base year prices are shown since these figures are apparently the only ones released by EPA to the protester):

<u>Offeror</u>	<u>Best and Final Offer</u>
PAI	\$383,960
EPL	\$433,991

EPA considered PAI's proposals to be superior technically and also lowest in cost. Therefore, EPA's technical evaluators recommended that PAI be awarded the contract, and the SSO, the contracting officer, followed this recommendation in awarding the contract to PAI.

EPL disputes this EPA determination. We will limit our discussion to the major findings of the TEP with respect to the proposals of PAI and EPL.

The TEP found that EPL's proposal demonstrated a "good understanding" of the nature of the work and included a detailed description of the scope of work (factor 1). Specifically, the TEP found that EPL's proposal contained a good and detailed description of the services required; the proposal lacked detail only in certain work segments, particularly liver and pulmonary pathology. Additionally, EPL's proposal demonstrated understanding of the potential problems that could occur during contract performance. With respect to the offeror's demonstrated scientific knowledge and experience in similar projects (factor 2), the TEP considered the EPL proposal to have demonstrated "a high level of scientific knowledge that is well-suited to this contract." The TEP found that EPL's staff has had experience on at least 10 similar programs, although no recent experience with similar EPA programs. Concerning experience of proposed personnel (factor 3), the TEP noted that the experience of EPL's proposed pathologists varied from 7 to 17 years and had extensive experience in long-range carcinogenicity studies. The TEP report reflects some concern as to the experience of the individuals which EPL proposed to devote to the work. Concerning quality assurance and facilities (factors 4 and 5), the TEP stated that the quality assurance plan presented by EPL was "very thorough" and found the proposed facilities "good."

The TEP, in evaluating PAI's proposal with respect to demonstrated understanding (factor 1), found that PAI's proposal demonstrated a "thorough understanding" of the scope of work. According to the TEP, PAI's description of the nature of the proposed work contained superior features which identified potential problems and offered suggested solutions. Concerning scientific knowledge and experience in similar projects (factor 2), the TEP found that the PAI proposal indicated that the firm had extensive experience with this type of contract work, both with EPA and other government agencies. From the standpoint of the experience of the proposed staff (factor 3), the TEP found that PAI's

staff was "above average" and had several years of experience on this specific type of program. Concerning quality assurance and facilities (factors 4 and 5), the TEP considered the quality assurance plan proposed by PAI to be "very thorough" and the facilities proposed were considered to have superior features, within close proximity to EPA, and well equipped, including an archives facility.

The SSO, the contracting officer, accepted the finding of the TEP. In his summary, determination, and rationale, the contracting officer determined that: 1) PAI's technical proposal indicated a greater understanding of the scope of work than EPL's proposal; 2) PAI demonstrated greater experience in government-sponsored pathology services; 3) PAI's proposed quality assurance was thorough; and 4) overall, PAI's proposal demonstrated technical superiority at a lower cost. Therefore, as SSO, the contracting officer made a determination to award the contract to PAI.

The contracting agency must evaluate proposals in conformance with the evaluation criteria stated in the solicitation to determine which technical proposal best meets its needs. GAO will independently scrutinize the contractor selection process to determine if the selection was reasonable under the circumstances and in conformance with the evaluation criteria, applicable statute or regulation. The purpose of this review, however, is not to substitute our judgment on essentially discretionary matters for that of the contracting activity. See METIS Corp., 54 Comp. Gen. 612 (1975), 75-1 CPD ¶ 44.

Our review of the record provides no legal basis to object to EPA's decision. The sole factual basis for EPL's allegations concerning improper evaluation is essentially EPA's decision to select PAI, an alleged "newcomer," for award despite the submission by EPL, a very experienced laboratory, of a sound technical proposal at a reasonable cost. However, we have independently reviewed PAI's technical proposal and find that PAI, rather than being a "newcomer," is a highly experienced incumbent with extensive government contract experience. In addition to its experience as the incumbent for EPA's environmental health research program, PAI has provided professional and technical support services for the Food and Drug Administration, a wide range of pathology support services to the National Toxicology Research and Testing Program, experimental pathology support services to another agency's cancer research program, and several other pathology support services to other government agencies under federal contract,

including the operation of a full-service histopathology laboratory.

Overall, having reviewed both proposals, we find PAI's government contract experience to be broader and more extensive than EPL's. Further, while we find both firms to be highly experienced and their staffs capable, we cannot disagree with EPA's conclusion that PAI proposed a highly qualified staff which was "above average," since PAI's proposed staff is represented by 10 Ph.D. degrees and five Master's degrees, while its overall collective experience in experimental pathology is 250 years, and it has been responsible for more than 500 publications.

Thus, our review indicates that EPA strictly adhered to the stated RFP evaluation criteria and that EPL's proposal was simply not evaluated to be technically equal to PAI's proposal nor were its evaluated costs lower than those of PAI. It appears to us that the EPA evaluators could rationally evaluate the proposals as they did. The fact that the protester objects to the evaluation, and perhaps believes its own proposal was better than as evaluated by EPA, does not render the evaluation unreasonable.

Honeywell, Inc., B-181170, Aug. 8, 1974, 74-2 CPD ¶ 87.

Thus, since we conclude that PAI was reasonably evaluated as technically superior and since its price proposal was low, we believe that award to PAI under the circumstances was not only reasonable but required. See generally DLI Engineering Corp., B-218335, June 28, 1985, 85-1 CPD ¶ 742.

Several minor issues remain.

EPL notes that the solicitation contained instructions pertaining to certain direct costs and travel expenses. Specifically, the solicitation included a category described as "other direct costs" which provided that \$100,000 in direct costs would be used for evaluation purposes for the base year and another \$25,000 for travel costs. The instructions then contained a footnote which stated as follows:

"The amounts shown for other direct costs are provided solely for proposal purposes. If for any reason you believe these prescribed costs are either too high or too low for your particular situation or if by proposing these costs as a separate direct line item your proposal would be in violation of your prescribed accounting practices and/or the

cost accounting standards, then still include the specified amounts in your proposal, but in the narrative explain why you feel you can deviate from these amounts."

EPL, in its initial proposal and subsequently, notified EPA that it believed the agency's figures for travel and direct costs were excessive, partly because EPL maintained a Cincinnati, Ohio office at the site of contract performance. EPL believed it could also reduce certain other direct costs. EPL complains that EPA disregarded its recommendations and thereby misevaluated its proposal from a cost standpoint.

EPA states that its technical expert reexamined the amounts established by the solicitation for travel and other direct costs. He indicated to the contracting officer that additional travel beyond the Cincinnati area would be required during contract performance to support research under the proposed contracts. Concerning other direct costs, EPA's technical expert pointed out to the contracting officer that under the existing contract for these services, the contractor has experienced a growth of other direct costs during the life of the contract which required contract modifications to increase reimbursement for other direct costs. Accordingly, in the expert's best estimate, the amounts stated in the solicitation for travel and other direct costs were the most accurate "should cost" projections. The contracting officer accepted the expert's conclusions and, therefore, both the proposal of PAI and the proposal of EPL were evaluated using the amounts stated in the RFP.

We note that PAI also has a Cincinnati office. The contracting officer therefore states that any legitimate offset offered by EPL would also have had to be applied to PAI's cost proposal. Since both firms were evaluated using the solicitation's cost estimates, the contracting officer states that any adjustments in these two areas would not have had any effect on the relative cost standings of EPL and PAI. Our review of the record confirms the contracting officer's conclusions. Accordingly, we find that EPL has failed to show any prejudice by the cost methodology employed by EPA in arriving at the lowest cost offeror. See Centennial Computer Products, Inc., B-211645, May 18, 1984, 84-1 CPD ¶ 528.

Next, EPL argues that various procedural irregularities occurred or may have occurred during evaluation of proposals. Specifically, EPL maintains that, unlike the

practice followed by other agencies, EPA's technical evaluation panel did not contain outside experts; that our Office should verify that EPA's technical evaluation record contains the proper documentation and that appropriate supplemental reports were prepared by the TEP. These allegations are wholly procedural in nature and, in our view, would not provide a legal basis for disturbing an otherwise valid award. See generally Dynamic Science, Inc., B-214111, Oct. 12, 1984, 84-2 CPD ¶ 402.

Finally, in its comments on the agency report, EPL raises the issue of whether PAI's proposed costs were generally realistic. The sole basis for this contention by EPL is its knowledge of the price at which the contract to PAI was awarded. The agency report does not address this issue and, in its initial protest, EPL, while aware of the contract price, did not raise this issue. We therefore will not consider this matter. Protests must be filed with our Office within 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1985). Here, EPL, aware of the contract price, did not protest the issue of the realism of PAI's costs until it filed its comments on the report. Accordingly, we find the issue untimely filed and we therefore dismiss it.

The protest is denied in part and dismissed in part.

for *Leyman E. Fox*
Harry R. Van Cleve
General Counsel